

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	MDL No. 1456
IN RE PHARMACEUTICAL INDUSTRY)	Master File No. 01-12257-PBS
AVERAGE WHOLESALE PRICE LITIGATION)	
_____)	Judge Patti B. Saris
)	
THIS DOCUMENT RELATES TO:)	
State of California, <i>ex rel.</i> Ven-A-Care v.)	
Abbott Laboratories, <i>et al.</i>)	
03-CV-11226-PBS)	
_____)	

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANT ZLB BEHRING,
LLC'S INDIVIDUAL MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

PLAINTIFFS' RESPONSE

In its separate motion to dismiss, Z.L.B. Behring ("Behring") asserts there is a lack of specificity, as required under Rule 9 of the Fed. R. Civ. P., for Plaintiffs' allegations regarding blood factors, a form of anti-hemophiliac drug manufactured by Behring. Behring asserts, in particular, that the First Amended Complaint in Intervention ("FAC") lacks specificity regarding Behring blood factor drugs, which are reimbursed based upon a Medi-Cal provider's certification of the acquisition cost. Plaintiffs do not dispute Behring's assertion regarding Rule 9(b) deficiencies as to Behring *blood factor drugs*, and they withdraw their false claim allegation concerning Behring *blood factor drugs* from the FAC.

In its motion, Behring does not argue that any of its other products are reimbursed by Medi-Cal using the same reimbursement formula as blood factors. In fact, as alleged in the FAC, the reimbursement formula for other types of drug products manufactured by Behring and identified in the FAC and the supporting sealed exhibit pertaining to Behring (FAC, Exh. B), for drugs known as immune globulins (IVIGs), is based upon prices reported in the compendia, and not on the basis of provider-certified acquisition costs. Sealed exhibit B to the FAC sets forth in detail the pricing differentials, or spreads, for the immune globulins (IVIGs) manufactured by Behring. Plaintiffs have thoroughly alleged the factual basis for their claims that Behring's conduct with respect to the immune globulins (IVIGs) violates the California False Claims Act. *See* FAC ¶¶ 56-59 and Exh. B to the FAC. As set forth more fully in Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion to Dismiss the First Amended Complaint in Intervention (filed contemporaneously with this Response), the allegations within the FAC satisfy the

requirements of Rules 9(b) and 12(b)(6) of the Fed. R. Civ. P.

Respectfully submitted,
BILL LOCKYER
Attorney General for the State of California

Dated: March 2, 2006

By: /s/ Nicholas N. Paul
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FLORIDA KEYS, INC.**

CERTIFICATE OF SERVICE

I, Nicholas N. Paul, hereby certify that on March 2, 2006, I caused a true and correct copy of the foregoing, **PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANT ZLB BEHRING, LLC'S INDIVIDUAL MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2, by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

Dated: March 2, 2006

/s/ Nicholas N. Paul
NICHOLAS N. PAUL
Supervising Deputy Attorney General